

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of)
)
Grandfathered Short-Spaced FM) MM Docket No. 96-120
Stations) RM-7651

RECEIVED

JUL 22 1996

COMMENTS OF
COMPASS RADIO OF SAN DIEGO, INC.

FEDERAL COMMUNICATIONS
COMMISSION
OFFICE OF SECRETARY

COMPASS RADIO OF SAN DIEGO, Inc. ("Compass"), by its attorneys, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its instant Comments in the above-captioned rulemaking proceeding, in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, __ FCC Red __, FCC 96-236 (released June 14, 1996) (hereinafter "NPRM"). In support whereof, it is shown as follows:

I. Interest of Compass In This Proceeding

Compass is the licensee of Radio Station KXST(FM) (formerly KIOZ(FM)), Oceanside, California. Compass became the licensee of KXST(FM) effective as of April 1, 1996, pursuant to Commission consent to the assignment of the station's license from its prior licensee, Par Broadcasting Company, A California General Partnership (see File Nos. BALH-951103EH-EO, granted February 6, 1996).

No. of Copies rec'd 029
List ABCDE

Presently pending before the Commission is an application (File No. BPH-910612ID) for a construction permit for a minor modification of the technical facilities of Radio Station KXST(FM). That application seeks to improve the station's technical facilities by relocating the

Table of Contents

	Page
Table of Contents	-i-
Summary	-ii-
I. Interest of Compass in This Proceeding	1
II. Introduction	3
III. Brief History and Development of FM Broadcasting	7
IV. Liberalization of Section 73.213 of the Rules With Respect to Grandfathered Short-Spaced Second And Third Adjacent Channel Stations, As Proposed By the Commission Under "Proposal 2" in Paragraphs 17 - 26 of Its NPRM, Would Serve The Public Interest.	15
A. Significant Public Interest Benefits Would Flow From Adoption of Proposal 2	15
1. Enhancement of the Ability of Broadcasters to Compete And To Remain Viable in the Face of Consolidation of Onership	15
2. Better Service To The Public	20
3. Conservation of Scarce Commission Resources	24
B. Adoption by the Commission of Its Proposals to Liberalize Section 73.213 of The Rules For Grandfathered Short-Spaced Second and Third Adjacent Channel Stations Will Not Result in Increased Interference to Such Stations.	27
1. Memphis, Tennessee	32
2. Miami, Florida	33
3. Greenville, South Carolina	33

4. Washington, D.C.	34
5. Tijuana, Mexico	34
V. The Commission Should Eliminate its Policy On Agreements by Grandfathered Short-Spaced Stations	37
VI. Conclusion	39

Summary

In this proceeding, the Commission has a unique opportunity to restore balance and flexibility in its regulatory regime with respect to processing of modification applications for grandfathered short-spaced stations whose licensees find it necessary to relocate or improve technical facilities in light of changing circumstances. By adopting the proposals in its NPRM with respect to second adjacent channel and third adjacent channel grandfathered short-spaced stations, the Commission will be providing greater flexibility for such stations to meet the challenges posed by operating in today's highly competitive and increasingly consolidated radio environment and for such stations to better serve their audiences. Correspondingly, scarce Commission resources can be conserved by adoption of the Commission's proposals. Importantly, adoption of those proposals with respect to second and third adjacent channel grandfathered short-spaced stations will not result in increased interference to any station.

For the reasons set forth above, the Commission should liberalize Section 73.213(a) with respect to grandfathered short-spaced second adjacent channel and third adjacent channel stations in the manner proposed in Paragraph 25 of its NPRM in this proceeding. Alternatively, the Commission should modify Section 73.213(a) for such second adjacent channel and third adjacent channel grandfathered short-spaced stations in the manner proposed in Paragraph 26 of the NPRM. In addition, the Commission should adopt its proposal, in Paragraph 30 of its NPRM, to no longer require grandfathered short-spaced second adjacent and third adjacent

channel stations seeking relocation of or improvement in technical facilities to obtain a mutual facilities improvement agreement with other such stations. As shown above, adoption of these proposals will result in significant public interest benefits, while not posing any risk of any additional interference to grandfathered short-spaced stations.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
JUL 22 1996

In the Matter of)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Grandfathered Short-Spaced FM
Stations)

MM Docket No. 96-120
RM-7651

COMMENTS OF
COMPASS RADIO OF SAN DIEGO, INC.

COMPASS RADIO OF SAN DIEGO, Inc. ("Compass"), by its attorneys, pursuant to Sections 1.415 and 1.419 of the Commission's Rules, hereby submits its instant Comments in the above-captioned rulemaking proceeding, in response to the Commission's Notice of Proposed Rule Making in the above-captioned proceeding, __ FCC Rcd __, FCC 96-236 (released June 14, 1996) (hereinafter "NPRM"). In support whereof, it is shown as follows:

I. Interest of Compass In This Proceeding

Compass is the licensee of Radio Station KXST(FM) (formerly KIOZ(FM)), Oceanside, California. Compass became the licensee of KXST(FM) effective as of April 1, 1996, pursuant to Commission consent to the assignment of the station's license from its prior licensee, Par Broadcasting Company, A California General Partnership (see File Nos. BALH-951103EH-EO, granted February 6, 1996).

Presently pending before the Commisison is an application (File No. BPH-910612ID) for a construction permit for a minor modification of the technical facilities of Radio Station KXST(FM). That application seeks to improve the station's technical facilities by relocating the

station's transmitter site by 11.6 km south by increasing the station's effective radiated power to 14.5 kW, and by reducing the station's antenna height above average terrain to 249 meters. As shown in Compass' application, the presently licensed transmitter site of KXST(FM) is short-spaced under Section 73.207 of the Commission's Rules, to (1) first adjacent channel Stations KSCA(FM) (formerly KLIT), Glendale, California; and KLCX(FM), Indio, California; and (2) third adjacent channel Station KGB-FM, San Diego, California. Since these short-spacings existed prior to November 16, 1964, when the Commission implemented a Table of FM Allotments for the commercial FM broadcast service, the KXST(FM) modification application is governed by Section 73.213(a) of the Commission's Rules. Under Section 73.213(a), a grandfathered short-spaced station, such as KXST(FM) may have its technical facilities modified or relocated, provided that the 1 mV/m field strength contour of that station is not extended toward the 1 mV/m field strength contour of any other short-spaced station.

The Compass modification application for KXST(FM) proposes reduction of existing, grandfathered short-spacing to first adjacent channel Station KSCA(FM), Glendale, California, and proposes complete elimination of all of the existing grandfathered short-spacing to Radio Station KLCX(FM), Indio, California. Only toward third adjacent channel grandfathered short-spaced Station KGB-FM, San Diego, California, does Compass propose the extension of the KXST(FM) predicted 1 mV/m contour, and, accordingly, the KXST(FM) modification application requests waiver of Section 73.213(a) of the Commission's Rules.¹

¹ On November 30, 1995, the Mass Media Bureau dismissed the KXST(FM) modification application and denied the waiver requests contained therein. On January 16, 1996, an Application For Review was filed with the Commission seeking review and reversal of
(continued...)

Based on its ownership of Radio Station KXST(FM), and in light of the fact that certain of the issues under consideration in this proceeding will necessarily have significant implications for Commission action on the KXST(FM) modification application, Compass has an immediate interest in the Commission's determinations in this rulemaking proceeding. The Commission's resolution of the issues in this proceeding will have profound consequences for the future ability by grandfathered short-spaced FM stations to modify their technical facilities to meet changing circumstances. Compass' experience with certain of the matters here under consideration and its instant Comments will thus be of material assistance to the Commission in resolving this rulemaking proceeding.

II. Introduction

In its NPRM in this proceeding, the Commission solicited comment on several proposals designed to eliminate unnecessary regulations and streamline the current method of modifying the technical facilities of pre-1964 "grandfathered short-spaced FM stations" -- i.e., those FM broadcast stations at locations authorized prior to November 16, 1964,² that did not meet the separation distances required by the later-adopted Section 73.207 of the Commission's Rules and which have remained short-spaced since that time. The Commission proposed to eliminate restrictions in its technical rules that unnecessarily impede flexibility as to transmitter site

¹ (...continued)
the Bureau's November 30, 1995 dismissal. That Application For Review remains pending before the Commission.

² November 16, 1964 was the effective date upon which the Commission implemented a Table of Allotments for the FM Broadcast service. See Revision of FM Broadcast Rules (Docket No. 14185, Fourth Report and Order), 40 FCC 868, 885 (1964).

selection for such grandfathered short-spaced stations. In particular, the Commission proposes the following in its NPRM:

a. Proposal 1:

The Commission proposes, for applications for modification of technical facilities by grandfathered short-spaced co-channel and first adjacent channel stations, to replace the current prohibition in Section 73.213(a) of the Commission's Rules against extending the 1 mV/m contour, with straightforward interference showings based on the desired-to-undesired signal strength ratio method. More specifically, the Commission proposes to amend Section 73.213(a) to allow stations with grandfathered co-channel and first adjacent channel short-spacings to modify their technical facilities based on a showing that meets the following three criteria:

- i. There must be no increase in either the total predicted interference area or the associated population within that area. Total interference is to be defined as the sum of all interference caused and received by a station.
- ii. There must be no increase in interference predicted from the proposed facilities to any individual co-channel or first adjacent channel grandfathered short-spaced station;
- iii. The applicant must demonstrate that any new area predicted to lose service as a result of interference has adequate service remaining (i.e., reception capability from five or more aural broadcast services).

Co-channel interference will be predicted to exist at all locations within the desired station's protected coverage contour where the undesired (interfering) F(50,10) field strength exceeds a value 20 dB below the desired (protected) F(50,50) field strength. First adjacent channel interference is predicted to exist at all locations within the desired station's protected coverage contour where the undesired (interfering) F(50,10) field strength exceeds a value 6 dB below the desired (protected) F(50,50) field strength.

b. Proposal 2:

(i) Option 1:

The Commission proposes to eliminate both the second adjacent channel and third adjacent channel spacing requirements for grandfathered short-spaced stations in connection with applications to modify the technical facilities of this very limited category of grandfathered stations.

(ii) Option 2:

Part I:

Under Proposal 2, any second adjacent channel or third adjacent channel grandfathered short-spaced station whose transmitter site is not presently inside the protected service contour of the short-spaced station would not be permitted to relocate to a transmitter site which is inside the protected service contour of the short-spaced station.

Part II:

Under Proposal 2, any second adjacent channel or third adjacent channel grandfathered short-spaced station whose transmitter site is already located within the protected service contour of the protected short-spaced station would be permitted to change transmitter site to any location with respect to that short-spaced station, and the station proposing to be modified could receive interference in an area that was not already being served by that station.

c. Proposal 3:

The Commission proposes to eliminate the need to obtain agreements by grandfathered short-spaced stations proposing improvements in technical facilities.

Compass' instant Comments are confined to addressing those aspects of the Commission's NPRM which relate to grandfathered short-spaced second adjacent channel and third adjacent channel stations. Accordingly, Compass takes no position on Proposal 1, supra.

which deals exclusively with co-channel and first adjacent channel grandfathered short-spaced stations.

The Commission's proposals for liberalizing Section 73.213 of its Rules with respect to grandfathered short-spaced stations on second adjacent channels and third adjacent channels would serve the paramount public interest by providing such stations with needed flexibility to meet changing circumstances, including shifts in population and audience. In this era of unprecedented consolidation of ownership in the radio industry, it is critical that radio broadcasters be capable of maximizing their stations' technical facilities as long as no additional interference results. The Commission's proposals for second and third adjacent channel grandfathered short-spaced FM stations would provide the flexibility for such stations to modify their technical facilities but without any risk of increasing interference to grandfathered short-spaced second adjacent channel and third adjacent channel stations.

Accordingly, for the reasons set forth below, Compass enthusiastically supports adoption by the Commission of Option 1 of Proposal 2, above, as more fully specified in Paragraph 25 of the NPRM herein. Adoption of that Option would not only facilitate improvement of station technical facilities by grandfathered short-spaced second adjacent channel and third adjacent channel FM stations, but would also eliminate a significant amount of unnecessary workload which is presently imposed on the Commission's staff in connection with the processing of modification applications for such stations. In the unlikely event, however, that the Commission declines to adopt Option 1 of Proposal 2, above, Compass supports adoption of Option 2 of

Proposal 2, above, as more fully set forth in Paragraph 26 of the Commission's NPRM herein.

Although this Option is not as flexible as the proposed standard set forth under Option 1 of Proposal 2 and described in Paragraph 25 of the Commission's NPRM, nonetheless, the proposed regulatory scheme under Option 2 also would still allow some flexibility in the transmitter site selection for grandfathered short-spaced second adjacent channel and third adjacent channel stations, while limiting increases in the interference area. However, this Option 2 approach does not effectuate the same savings in scarce Commission resources and workload as Option 1 under Proposal 2, above, since the resources of the Commission's staff would still be required to analyze, on a case-by-case basis, the particulars of site selection with respect to second and third adjacent channel grandfathered short-spaced FM stations.

In all events, Compass enthusiastically supports the Commission's Proposal 3 to eliminate the need to obtain agreements by grandfathered short-spaced stations proposing improved technical facilities.

III. Brief History and Development of FM Broadcasting

FM broadcasting was first authorized by the Commission in 1940, and the first commercial FM station began operation in 1941. See Revision of FM Broadcast Rules (Docket No. 14185), __ FCC __, 21 RR 1655, 1657 (1961). In 1945, the FM broadcast service was shifted from the 42 MHz band to the current band of 88 MHz to 108 MHz. The band was divided into 100 channels, each 200 kHz wide. These 100 channels are designated by number from 201 to 300. The lowest 20 of the 100 channels are reserved for noncommercial educational

use, while the upper 80 channels are allocated for commercial use. Id. After the initial spurt of growth of the FM broadcast service in 1946 and 1947 little further growth of the service occurred for a number of years. In 1955, the number of commercial FM stations stood at 560 Id.

At the time of the shift of the FM broadcast service to its present frequency band in 1945, the Commission put into effect a tentative table of FM channel assignments, under which particular FM channels were assigned to particular cities. Id. at 1658. In August 1958, the Commission abandoned the plan of a fixed table assigning specific channels to specific communities and deleted the FM table of assignments. Thereupon, FM channel assignments were made on the same "demand" basis as were AM channel assignments -- i.e., an applicant proposed the use of a particular channel, and, if the application complied with the Commission's Rules and the applicant were otherwise qualified, and if no interference would be caused to co-channel and adjacent channel stations, the application would be granted. Id. By 1961, the Commission felt the need to reassess the merits of FM station assignment pattern that was evolving under this "demand" procedure. Id.

In its Third Report, Memorandum Opinion and Order in Docket No. 14185, 40 FCC 747 (1963), the Commission adopted a new FM table of allotments and a channel allocation scheme based on fixed mileage separations between stations on the same FM channel and on three adjacent channels on either side of the particular station's channel. This allotment scheme was applicable to new stations, while the policies governing existing, grandfathered short-spaced

stations were addressed in the Commission's Fourth Report and Order in Docket No. 14185, 40 FCC 868, 3 RR 2d 1571 (1964). (hereinafter "Fourth Report and Order").

In its Fourth Report and Order, the Commission permitted then-existing co-channel and first adjacent channel short-spaced stations to achieve facilities to the maximum for their class provided that certain maximum mileage separations between the stations' transmitter sites were met. However, in the Fourth Report and Order, the Commission treated stations on existing short-spaced second adjacent channels and third adjacent channels differently from the way the Commission treated short-spaced co-channel and first adjacent channel stations. Specifically, the Commission determined that it would permit stations to disregard short-spaced stations on second and third adjacent channels in any applications for improvement of technical facilities. Fourth Report and Order, *supra*, 40 FCC at 879.

In adopting this approach for pre-1964 grandfathered second adjacent channel and third adjacent channels short-spaced FM stations, the Commission noted as follows:

"With very few exceptions, all the parties recommend that short-spacings on second and third adjacent channels be disregarded in any proposal which is adopted. It was pointed out that this interference is usually very small, occurs around the transmitter site of the station causing the interference, and that in any event the small amounts of interference caused are more than offset usually by the advantages of power increases for all stations.[T]he situations we are dealing with here are existing ones in which some interference already exists. And as has been shown further, the increase in interference is only in a small ring around the station [i.e., around the transmitter site of the station seeking to improve technical facilities] in the order of a few miles to less than 1/2 mile depending on the relative facilities of the stations involved. Another great difficulty with taking into account such [existing second adjacent channel and third adjacent channel] assignments is this: in the event a station is encompassed by the 1 mV/m contour of another station either under its existing or expanded facilities, the station

cannot improve its facilities in any direction and is thus frozen at its present facilities. In the case of co-channel and first adjacent channel separations, this situation cannot occur and a station can usually obtain an increase [technical facilities] in some directions. Because of the restrictions which would be imposed, the usually small amount of additional interference resulting, and the overall benefits to be obtained on balance, we will permit stations to disregard short-spaced stations on second and third adjacent channels in making requests for increased facilities. [Emphasis added.]”

Fourth Report and Order, *supra*, 40 FCC at 879.³

As a result of these policies, in its Fourth Report and Order, the Commission adopted, as part of Section 73.213(a) of its Rules, a new table of routinely permissible power and antenna heights limited (“brackets”) that applied only to modifications of technical facilities for grandfathered short-spaced co-channel stations and first adjacent channel stations. No restrictions were placed on technical improvements for grandfathered short-spaced stations on second and third adjacent channel stations.

Nearly 20 years later in 1983, the Commission adopted a major revision of its FM channel allotment rules in BC Docket No. 80-90 by creating additional classes of FM stations (Classes B1, C1 and C2), with new operating maximum power and antenna height limits and associated maximum mileage separation distances between co-channel and adjacent channel stations. See Report and Order in BC Docket No. 80-90, 94 FCC 2d 152 (1983); Memorandum Opinion and Order in BC Docket No. 80-90, 97 FCC 2d 279 (1984). However, the aforementioned ³Table in Section 73.213(a) was not modified to accommodate the new classes of

³ The channel allocation plan adopted by the Commission in Docket No. 14185 pertained exclusively to the 80 commercial FM channels and not to the 20 FM channels reserved for noncommercial educational use. These latter channels are to this day allocated on a demand basis, just as commercial FM stations were so allotted between 1958 and 1963.

FM stations. Moreover, some of the pre-1964 grandfathered stations were reclassified to different classes because their authorized technical facilities conformed to one of the new station classes created in BC Docket No. 80-90. Those reclassified stations which met the new spacing requirements applicable to their respective new classes of stations lost their grandfathered status.

In 1987, Section 73.213 of the Commission's Rules was amended by replacing the Table in Section 73.213(a) and the entire text of the rule section with a single paragraph that essentially provides that a grandfathered short-spaced station may have its technical facilities modified or relocated, provided that the 1 mV/m field strength contour of that station is not extended toward the 1 mV/m field strength contour of any other short-spaced station.⁴ See Second Report and Order in MM Docket No. 86-144, 2 FCC Rcd 5693 (1987).

Thus, the new requirement of Section 73.213(a), as adopted in 1987, was significantly different from the rules that it replaced in two important respects. First, stations were restricted from increasing their authorized facilities in the direction of a short-spaced station and from moving closer to such a station; those options had been available under the previous rules. Second, the new rule, as adopted in 1987, did not exempt grandfathered short-spaced stations operating on second adjacent channel or third adjacent channels from the spacing or other

⁴ Nonetheless, under Section 73.213(a) of the Rules, the Commission will consider, on an ad hoc basis, increases in the technical facilities of a short-spaced FM station, despite a 1 mV/m contour extension, where an agreement exists between the two stations contemplating improvement of the technical facilities of each of the stations, and where an appropriate public interest showing is made. See Section 73.213 of the Rules: see also Policy With Respect To Agreement Between Short-Spaced FM Stations, 57 FCC 2d 1263 (1975).

protection criteria, as was done under the former version of Section 73.213 of the Rules. The combination of these two new rule changes substantially reduced the number of grandfathered short-spaced stations that were even potentially able to increase technical facilities or to change transmitter location. The revised version of Section 73.213 which was adopted in 1987 did, however, continue the Commission's policy of considering mutual facilities improvement agreements between grandfathered short-spaced stations. See Policy With Respect To Agreement Between Short-Spaced FM Stations, supra, 57 FCC 2d 1263 (1975); see also Section 73.213(a) of the Commission's Rules. The Commission's 1987 revisions to Section 73.213(a) -- including the rule change that required consideration of second and third adjacent channel short-spacings in the context of applications for improvement in the technical facilities of grandfathered short-spaced stations -- were premised solely on the basis of the Commission's undocumented and unsupported speculation that improvement of the technical facilities of grandfathered short-spaced second adjacent channel and third adjacent channel stations might increase the "risk" of interference. The Commission stated, in this regard, as follows:

"Grandfathered short-spaced stations have had 22 years to take advantage of Section 73.213 of our rules to optimize their facilities. We believe that continuing to allow these stations to routinely modify their facilities in ways that increase the risk of interference is not in the public interest. The FM allocation is becoming increasingly occupied, and continuing to grant routinely modification requests that increase the probability of interference tends to run counter to our objective of promoting efficiency in the use of this spectrum."

Second Report and Order in MM Docket No. 86-144, supra, 2 FCC Rcd 5693, 5696 (1987).

Unfortunately, the Commission's foregoing conclusions in 1987 were not predicated on any record evidence that improvement in the technical facilities of grandfathered short-spaced second adjacent channel stations and third adjacent channel stations would, in fact, pose an

increase risk of interference to other grandfathered short-spaced second and third adjacent channel stations. Nowhere in the Commission's Second Report and Order in MM Docket No. 86-144, supra, does the Commission make any finding of fact or point to any record evidence in the proceeding that in any way casts the slightest doubt on the validity of the findings of fact and conclusions that the Commission reached in its Fourth Report and Order in Docket No. 14185, with respect to second and third adjacent channel grandfathered short-spaced stations. As shown above, the Commission there determined that short-spacings with respect to second and third adjacent channel grandfathered short-spaced stations seeking to improve technical facilities should be disregarded, since any possible additional interference that might result from such improvement

“... is usually very small, occurs around the transmitter site of the station causing the interference, and that in any event, the small amounts of interference caused are more than offset usually by the advantages of power increases for all stations.”

Fourth Report and Order in Docket No. 14185, supra, 40 FCC 868, 879 (1964).

Significantly, nowhere in the Commission's 1987 Second Report and Order in MM Docket No. 86-144 is there any reasoned analysis pointing to record evidence as the basis for summary rejection, in that proceeding, of the comments filed in the proceeding by numerous parties, including the National Association of Broadcasters and the licensees of a number of grandfathered short-spaced FM stations, which opposed the Commission's proposal to amend Section 73.213(a) on the ground that it would unduly restrict flexibility or upgrade for modification of the technical facilities of grandfathered short-spaced FM stations. Indeed, the Commission noted the multitude of comments pointing to the fact that no restrictions on the scope of the former Section 73.213 of the Rules were warranted. Id. at 5696.

In its NPRM in this proceeding, the Commission signals a return to a more reasoned approach regarding possible interference by second and third adjacent channel grandfathered short-spaced FM stations which seek to improve technical facilities. The Commission expressly noted, in its NPRM in this proceeding, that, in effectuating its 1987 changes to Section 73.213 of the Rules in its Second Report and Order in MM Docket No. 86-144, the Commission had merely

“... speculated that continuing to allow the grandfathered stations to routinely modify their facilities according to the former rule would increase the risk of causing interference. [Emphasis added.]”

NPRM, slip op. at 5, ¶9

For the reasons set forth below, adoption of the Commission’s proposals to liberalize Section 73.213(a) for second and third adjacent channel stations would serve the paramount public interest while not causing any risk of any increase in interference.

**IV. Liberalization Of Section 73.213 of the Rules With Respect
Grandfathered Short-Spaced Second and Third Adjacent
Channel Stations, As Proposed By The Commission Under
“Proposal 2” in Paragraphs 17-26 Of Its NPRM, Would
Serve The Public Interest**

**A. Significant Public Interest Benefits Would Flow
From Adoption Of Proposal 2**

**1. Enhancement Of The Ability Of Broadcasters To Compete
And To Remain Viable In The Face Of Consolidation of Ownership**

On February 8, 1996, President Clinton signed into law the Telecommunications Act 1996.⁵ Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 direct the Commission to revise Section 73.3555 of its rules regarding its local Radio Contour Overlap Rules (Section 73.3555(a)(1) of the Commission's Rules) and regarding the National Multiple Radio Ownership Rules. In Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership, 11 FCC Rcd __ , 2 Communications Reg. 376 (1996)⁶, the Commission deleted its former National Multiple Ownership Rule (former Section 73.3555(e)(1)(i)). As a result, there are no longer any limitations in the Commission's Rules on the total number of AM or FM broadcast station which may be owned or controlled by one entity nationally. In addition, the Commission amended its local Radio Contour Overlap Rule to provide that:

- (i) In a radio market with 45 or more commercial radio stations, a party may own, operate or control up to eight commercial radio stations, not more than five of which are in the same broadcast service (i.e., AM or FM);

⁵ Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁶ 61 Fed. Reg. 10689 (March 15, 1996)

- (ii) In a radio market with between 30 and 44 exclusive commercial radio stations, a party may own, operate or control up to seven commercial radio stations, not more than four of which are in the same service (AM or FM);
- (iii) In a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate or control up to six commercial radio stations, not more than four of which are in the same service (AM or AM); and
- (iv) In a radio market with 14 or fewer commercial radio stations, a party may own, operate or control up to five commercial radio stations , not more than three of which are in the same broadcast service (AM or FM), except that a party may not own, operate of control more than 50 percent of the stations in such market.

Id.; Section 73.3555(a)(1) of the Commission's Rules.

These rules represent dramatic liberalization of the prior version of the Commission's Radio Contour Overlap Rule.

As a result of these rule changes, the radio broadcasting industry is presently experiencing unprecedented consolidation of ownership of stations. Recent trade press reports have indicated that, as of June 24, 1996, total radio industry consolidation for Arbitron-rated markets is now at a level of 52.5 percent rated of all commercial radio stations in the United States; stated otherwise, 2,552 out of a total of 4,859 commercial radio stations in Arbitron-rated markets are now linked in some form of duopoly, "superduopoly" (i.e., a combination of three or more radio stations in the same broadcast service in the same broadcast service in the same market or in markets with overlapping contours), or in a time brokerage arrangement. See 13 Radio Business Report, Issue 25, at 10 (July 1, 1996).⁷ Moreover, according to the same report,

⁷ The statistics quoted herein are reproduced with the permission of Radio Business Report, Inc.

consolidation in the top 50 radio markets now stands at 56.7 percent, and “superduopoly” consolidation in the top-50 radio markets now stands at 24.8 percent.

In addition, the same Radio Business Report story notes that consolidation in the radio industry is spreading quickly into the markets below the top-50. In particular, the report indicates that, whereas consolidation is at a level of 56.7 percent in the top-50 radio markets, consolidation is at a level of 57.0 percent in markets 51-100. Id. Furthermore, Radio Business Report notes that, since May, 1996, the growth of consolidation in the radio industry has been slightly faster in markets 51-100 than in the top-50 markets. Id. Radio Business Report states that consolidation in the radio industry in markets 101-150 is at a 49.2 percent level, and that “superduopolies” now account for 18.5 percent of the commercial broadcast stations in these markets. Id. Additionally, according to Radio Business Report, in radio markets 151-200, total consolidation is at a 48.2 percent level, and that “superduopolies” account for 17.7 percent of all commercial stations in radio markets 151-200. Id. According to Radio Business Report, 955 commercial radio stations in the United States were involved in a “superduopoly” as of June 24, 1996. Id. at 12.

Indeed, a recent article in Radio & Records Magazine quotes panelists at a recent seminar on the radio industry as saying that the present whirlwind consolidation in radio station ownership is only 20 percent complete.⁸ It has been speculated that, when the dust settles on

⁸ See Radio & Records 5 (June 7, 1996) at 13.

consolidation, it is possible that 75 percent of the radio stations in the United States will eventually end up in the hands of the top 10 multi-station group owners. Id.

In the face of these realities, it is clear that survival for broadcasters who are not among the largest group operators is and will continue to be more difficult than ever, from a competitive standpoint, particularly in competing on a day-to-day basis with large, consolidated multiple station operators who can better realize economies of scale and who typically have access to far greater financial resources than the non-consolidated broadcaster. The independent broadcaster -- even one which is a licensee of a number of stations nationwide -- may be in for the competitive fight of its life, where its very survival may be at stake.

These competitive challenges resulting from liberalization of the Commission's multiple ownership rules warrant a recognition by the Commission that broadcasters facing these hurdles need to be able to maximize the technical facilities of their stations, as long as no additional interference is caused as a result.

Viewed from this analytical perspective, adoption by the Commission of either of the two alternative approaches to its Proposal 2 in its NPRM would assist broadcasters in maintaining competitive viability by providing licensees of grandfathered short-spaced stations seeking to improve facilities on second and third adjacent channels with the potential of improving or relocating their technical facilities, in order to better reach and serve their intended audiences.

This is a potential which is presently denied to such licensees under the 1987 revisions to Section 73.213(a) of the Commission's Rules.

Clearly, the paramount public interest, convenience and necessity is best served by promoting the maintenance of independent and competitive radio stations, thereby fostering diversification of ownership of mass communications media. The Supreme Court has recognized that:

“... the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversification of program and service viewpoints, as well as by preventing undue concentration of economic power.”

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 436 U.S. 775, 780 (1978).

A primary foundation of the Commission's multiple ownership limits has been the concept of diversity of ownership. It has been the cornerstone of past analyses of the multiple ownership rules that diversity of ownership of broadcast facilities (i.e. “outlet diversity”) leads to diversity of viewpoints (i.e., “content diversity”). See, e.g., Metro Broadcasting v. FCC, 497 U.S. 547 (1990) (recognizing evidence demonstrating a nexus between increased minority ownership and diversity of programming).

The public interest standard of the Communications Act includes examination of competitive issues; indeed, the Commission is empowered “to make findings relating to the pertinent antitrust policies, draw conclusions from the findings and weight these conclusions along with other important public interest considerations.” U.S. v. FCC, 652 F.2d 72, 81-82

(D.C. Cir. 1980) (en banc). Competition is a means to the end of maximizing consumer welfare and efficient allocation of resources.

In short, liberalization of Section 73.213(a) for second and third adjacent channel grandfathered short-spaced stations, either by adoption of the proposals set forth in Paragraph 25 of the Commission's NPRM (i.e., elimination of consideration of second and third adjacent channel grandfathered short-spacings) or by adoption of the two-tiered analysis set forth in Paragraph 26 of the Commission's NPRM, would foster a stronger and more competitive radio broadcasting industry, thereby fostering diversity of viewpoints and, in turn, thereby serving the public interest.

2. Better Service To The Public

Adoption by the Commission of either Option 1 for Proposal 2, as set forth in Paragraph 25 of the NPRM, or of Option 2 for Proposal 2, as set forth in Paragraph 26 of its NPRM with respect to second and third adjacent channel grandfathered short-spaced FM stations, will facilitate the ability by the licensees of such stations to respond in an appropriate and flexible fashion to changes in their audience or to other changes in their business environment.

In this regard, the Commission has recognized in its NPRM, under the current version of Section 73.213 of the Commission's Rules, many grandfathered stations do not even have the flexibility to maintain their existing coverage areas if circumstances require them to make such a change. However, under the former version of Section 73.213, as in effect from 1964 to 1987,